IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ALFREDO VILLOLDO, *et al.*,	)	
	)	
Plaintiffs/Petitioners,	)	
	)	
v.	)	
	)	
FIDEL CASTRO RUZ, *et al.*,	)	
	)	**Case No. 1:14-mc-25-LEK-CFH**
Defendants,	)	
	)	
v.	)	
	)	
THOMAS P. DINAPOLI, NEW YORK STATE COMPTROLLER	)	
	)	
Respondent/Custodian.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

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INTRODUCTION

The United States, by and through its undersigned counsel, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] in order to advise the Court of its views as to whether plaintiffs may seek to satisfy a judgment in their favor against the Government of Cuba by attaching and executing on certain blocked assets located in this district and held by the Comptroller of New York in his capacity as custodian of unclaimed funds under New York's Abandoned Property Law. The United States emphatically condemns the actions that give rise to this case, and expresses its deep sympathy for the victims and their family members. However, the Government also has a significant interest in ensuring that laws and regulations pertaining to the attachment of assets blocked pursuant to economic sanctions on foreign countries, which have a profound impact not only on how sanctions programs are administered but, more broadly, on the conduct of the foreign relations of the United States, are properly construed by the courts.

Specifically at issue in this case is whether the assets on which plaintiffs seek to execute are owned by Cuba (or by an agency or instrumentality of Cuba). Plaintiffs contend that they are so owned, by virtue of the alleged nationalization of Cuban corporations and/or the application of various Cuban laws. As explained below, the Government respectfully submits that, as all of the assets at issue are located in the United States, and have been so since before alleged nationalizations, the Court should conduct a choice-of-law analysis to determine whether Cuban law is the appropriate source of the substantive law to be applied in this case and, if necessary, whether the Cuban laws relied upon by plaintiffs operate as plaintiffs claim. If, upon conducting

[1] This provision provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. It provides a mechanism for the United States to submit its views in cases in which it is not a party. *See, e.g.*, *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 288 n.4 (S.D.N.Y. 2000).

this analysis, the Court concludes that the assets at issue are not blocked assets "of" Cuba, then plaintiffs' turnover petitions should be denied because the assets are subject to the comprehensive Cuban embargo and fall outside the license exception provided by the Terrorism Risk Insurance (TRIA), and thus cannot be transferred without a license from the Department of the Treasury's Office of Foreign Assets Control (OFAC). Such transfer would undermine the Cuban asset control regime, would be inconsistent with the purposes of the relevant statutory scheme by forcing potentially innocent third parties to subsidize Cuba's alleged wrongs, and would be incompatible with important U.S. foreign policy interests.

BACKGROUND

I. Statutory and Regulatory Background

This case involves the intersection of three related sources of statutory and regulatory authority—the Cuban Assets Control Regulations (CACR), the Foreign Sovereign Immunities Act (FSIA), and TRIA—which are summarized below.[2]

A. The Cuban Assets Control Regulations

Since 1963, the United States has imposed a comprehensive embargo on virtually all trade with Cuba. *See Regan v. Wald*, 468 U.S. 222, 226 & n.4 (1984). The current terms of the embargo administered by the Department of the Treasury are reflected in the CACR, *see* 31 C.F.R. Part 515, which were promulgated pursuant to the Trading With the Enemy Act of 1917 (TWEA), codified at 50 U.S.C. App. § 1 *et seq.*, and the Foreign Assistance Act of 1961 (FAA),

[2] The description of the statutory and regulatory background in this Statement of Interest, as well as the description of U.S. policy interests, *see infra* Argument, Section I.A., is largely identical to language in the Comptroller's Memorandum in Opposition to Plaintiffs' Motion for Entry of 28 U.S.C. § 1610(c) Order and First and Second Petitions for Turnover, ECF No. 27, which is in turn derived from a similar Statement of Interest filed by the United States in *Villoldo v. Computershare Ltd.*, No. 4:13-mc-94014 (D. Mass. June 30, 2014), ECF No. 27-5. The United States provides these descriptions again here for ease of reference.

Pub. L. No. 87-195, codified in part at 22 U.S.C. § 2370. Section 5(b) of TWEA authorizes the President to regulate and prohibit a wide range of transactions or dealings in any property in which a foreign country or a national thereof has any interest. *See* 50 U.S.C. App. § 5(b)(1)(B); *see also, e.g.*, *Havana Club Holding, S.A. v. Galleon, S.A.*, 203 F.3d 116, 133 n.17 (2d Cir. 2000). The President delegated his TWEA authority to the Secretary of the Treasury, who in turn delegated that authority to OFAC. *See Regan*, 468 U.S. at 226 n.2; *see also* 31 C.F.R. § 515.802.

Tracking section 5(b) of TWEA, the CACR prohibit any dealings in, or transfers of, any property in which Cuba or a Cuban national has an interest by any person subject to the jurisdiction of the United States, unless licensed by OFAC. *See* 31 C.F.R. § 515.201(b)(1). The "transfer" of a property interest is broadly defined in the CACR to include "any actual or purported act or transaction . . . the purpose, intent, or effect of which is to . . . transfer, or alter, any right, remedy, power, privilege, or interest with respect to any property . . . ." *Id.* § 515.310. This definition specifically includes the "issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment[.]" *Id.* The CACR also provide that, "[u]nless licensed . . . , any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property" subject to the regulations. *See id.* § 515.203(e).

B. Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act, under which plaintiffs obtained their default judgment, provides the exclusive basis for civil actions brought against foreign states in federal and state courts in the United States. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989); *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 47 (2d Cir.

2010); *Weininger v. Castro*, 462 F. Supp. 2d 457, 477 (S.D.N.Y. 2006). The FSIA provides that a foreign state is immune from suit unless a statutory exception applies. *See* 28 U.S.C. § 1604; *id.* § 1330(a); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983); *Weinstein*, 609 F.3d at 47. These include the so-called "terrorism exception," which provides that foreign states designated as state sponsors of terrorism shall not enjoy immunity in certain cases involving torture, extrajudicial killing, or other enumerated acts. *See* 28 U.S.C. § 1605A.[3]

A foreign state's assets are likewise generally immune from attachment under FSIA, *see* 28 U.S.C. § 1609, subject to several exceptions codified at 28 U.S.C. §§ 1610-1611. As relevant to a terrorism related judgment, one of these exceptions is found under section 1610(a)(7), which provides that a foreign state's property in the United States is not immune from attachment if it has been "used for a commercial activity in the United States" and "the judgment relates to a claim for which the foreign state is not immune under section 1605A." 28 U.S.C. § 1610(a)(7). Similarly, section 1610(b)(3) provides that the property of an "agency or instrumentality" of a foreign state is not immune if it is "engaged in commercial activity in the United States" and "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A." 28 U.S.C. § 1610(b)(3). The National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 (Jan. 28, 2008), added a special attachment provision for those plaintiffs who obtain a section 1605A judgment against a foreign state, which clarifies that when the property of a foreign state or its agency or instrumentality "is subject to attachment . . . *as provided in this section*," plaintiffs may attach such property to satisfy a judgment obtained

[3] In 1982, Cuba was designated as a state sponsor of terrorism by the Department of State, pursuant to the Export Administration Act, 50 U.S.C. App. § 2405(j). *See also* Decl. of Peter M. Brennan (May 10, 2012), Statement of Interest of the United States, *Hausler v. Republic of Cuba*, No. 1:08-cv-20197 (S.D. Fla. May 10, 2012), ECF No. 97-1 (describing reasons for Cuba's designation) (attached as Exhibit A).

against the foreign state under section 1605A without regard to whether the property is owned by the state itself or an agency or instrumentality of the state. *See* 28 U.S.C. § 1610(g) (emphasis added).[4]

C. Terrorism Risk Insurance Act

The Terrorism Risk Insurance Act, enacted by Congress in 2002, further addresses the circumstances under which a person holding a judgment obtained under section 1605A of FSIA may attach certain assets of foreign states that are terrorist parties. *See* Pub. L. No. 107-297, 116 Stat. 2322 (2002) (reprinted after 28 U.S.C. § 1610 Historical and Statutory Notes); *see also Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 54 (1st Cir. 2013). Section 201(a) of TRIA states:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605A], the blocked assets of that terrorist party (including blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Under TRIA, "terrorist parties" include foreign states that, like Cuba, have been designated as state sponsors of terrorism. *Id.* § 201(d)(4). Subject to several exceptions, "blocked assets" are in turn defined as assets seized or frozen by the United States under TWEA or the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, 1702. *See* TRIA § 201(d)(2).

TRIA permits attachment of property in certain cases in which attachment might otherwise have been precluded by FSIA. *See Bennett v. Islamic Republic of Iran*, 618 F.3d 19,

[4] This provision, however, is made subject to 28 U.S.C. § 1610(g)(3), which provides: "Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid or execution, or execution, upon such judgment."

21 (D.C. Cir. 2010); *Weininger v. Castro*, 462 F. Supp. 2d 457, 483-89 (S.D.N.Y. 2006). TRIA allows victims of terrorism to attach "blocked assets" without first obtaining a license from OFAC. *See* TRIA § 201(a).

II. Factual and Procedural Background

Because the Court is familiar with the factual and procedural background of this case, the Government provides only a brief summary here. On August 19, 2011, plaintiffs obtained a default judgment in Florida state court against the Cuban government and Fidel and Raul Castro, in the amount of $2.8 billion, for alleged acts of torture between 1959 and 2003. In May 2014, plaintiffs filed the instant action in this Court in order to attach and execute on assets in this district in satisfaction of the Florida state court judgment. Plaintiffs have filed three different turnover petitions, each seeking a different set of assets.

The First Turnover Petition seeks the assets in 677 accounts related to Compania Petrolera Trans-Cuba ("Trans-Cuba"), a Cuban oil company that was nationalized by the Cuban government in 1960, which are now held by the Comptroller in the name of individual uncompensated Trans-Cuba shareholders as a result of subsequent litigation in New York state courts. Plaintiffs' theory is that Trans-Cuba's assets in New York were also nationalized as a result of the nationalization decree and, therefore, should be deemed to be property of Cuba. *See* Petition for Turnover of Compania Petrolera Trans-Cuba Accounts Held By Comptroller of New York ("First Petition"), ECF No. 7. The Second Turnover Petition seeks the assets in accounts registered to 58 corporations or entities. Similarly, plaintiffs' theory is that Cuba nationalized all private businesses, and that the nationalizations extended to assets held outside of Cuba. *See* Petition for Turnover of Cuban Agency Accounts Held By Comptroller of New York ("Second Petition"), ECF No. 17. The Second Petition also seeks the assets in two accounts held by Banco

Nacional de Cuba, on the theory that it is an instrumentality of Cuba. *See id.* Finally, the Third Turnover Petition seeks the assets in 260 accounts held largely in the name of individuals who at some time resided in Cuba, on the theory that these accounts escheated to Cuba by virtue of the application of certain Cuban laws pertaining to the abandonment of property and inheritance. *See* Petition for Turnover of Cuban Escheated Accounts Held By Comptroller of New York ("Third Petition"), ECF No. 21.[5]

On September 24, 2014, the Government filed a Notice of Potential Participation, informing the Court that the United States was considering whether to file a Statement of Interest to address the question of whether assets that do not, on their face, belong to any of the defendants in this case should nevertheless be considered property "of" Cuba within the meaning of FSIA and TRIA by virtue of the application of Cuban law purporting to nationalize those assets. *See* ECF No. 38.

ARGUMENT

The United States has significant policy interests in assuring that TRIA and FSIA are properly construed, and that blocked assets are not transferred unless they fall within the narrow subset of blocked assets actually owned by a terrorist party as required under these provisions. As explained below, the Government respectfully submits that the Court should conduct a choice-of-law analysis to determine the appropriate law to apply to ascertain ownership of the assets located in the United States. Furthermore, even if such an analysis were to lead the Court to conclude that Cuban law is the appropriate substantive law to apply, the Court would then need to scrutinize whether the Cuban laws at issue operate as plaintiffs claim.

[5] As the Comptroller notes in his Memorandum in Opposition to Petition for Turnover of "Cuban Escheated Accounts," ECF No. 39, is appears that a small number of the accounts that are the subject of the Third Petition are actually held in the name of corporations or other business entities, rather than individuals. *See id.* at 5 n.3.

I. The Court Should Determine Whether the Accounts Are Assets "of" Cuba

A. Consistent with important U.S. policy interests, TRIA and FSIA only permit the attachment of assets that are actually owned by the terrorist party

Under TRIA and FSIA, in order for an asset to be subject to attachment and execution to satisfy a judgment in connection with a claim for which the foreign state was not immune under section 1605A, the asset must actually be owned by the judgment debtor terrorist party (or an agency or instrumentality thereof). *See, e.g.*, *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938-40 (D.C. Cir. 2013); *Calderon-Cardona v. JP Morgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 399-400 (S.D.N.Y. 2011), *appeal pending*, No. 12-75 (2d Cir.). TRIA states that a victim of terrorism who has obtained a judgment against a terrorist party may attach "the blocked assets *of* that terrorist party (including the blocked asserts of any agency or instrumentality of that terrorist party)." TRIA § 201(a) (emphasis added). Similarly, FSIA allows certain terrorism victims to attach certain "property *of* a foreign state" subject to a judgment under Section 1605A, and certain "property *of* an agency or instrumentality of such a state." 28 U.S.C. §§ 1610(a)(7), 1610(b)(3), 1610(g)(1) (emphases added).[6]

Supreme Court decisions indicate that, when used in the context of similarly worded statutes, "the use of the word 'of' denotes ownership." *Bd. of Trs. of the Leland Stanford Jr.*

[6] Contrary to plaintiffs' suggestion, section 1610(g) does not provide a basis for the attachment of the property at issue here. As noted above, section 1610(g) does not create an independent exception to the immunity of foreign state property from execution—rather, by its plain text, section 1610(g) only authorizes specified attachments "as provided in this section." 28 U.S.C. § 1610(g). Because section 1610 elsewhere requires a relationship to commercial activity on the part of the foreign state's property or by the foreign state agency or instrumentality as a condition of attachment, *see* 28 U.S.C. § 1610(a), (b), (d), it is apparent that Section 1610(g) carries forward this "commercial activity" requirement. *See Rubin v. Islamic Republic of Iran*, --- F. Supp. 2d ---, 2014 WL 1257947, at *7-*8 (N.D. Ill. Mar. 27, 2014). Plaintiffs do not argue that the relevant accounts are being used by Cuba "for a commercial activity in the United States" per Section 1610(a)(7). The other exceptions to immunity from execution under Section 1610(a) and (b) similarly do not appear to apply. Therefore, attachment of the accounts is not available under the FSIA.

Univ. v. Roche Molecular Sys., 131 S. Ct. 2188, 2196 (2011) (quoting *inter alia Poe v. Seaborn*, 282 U.S. 101, 109 (1930)); *see also Calderon-Cardona*, 867 F. Supp. 2d at 399-400. The statutory language used in FSIA and TRIA is also notably narrower than the language used in the blocking regulations themselves, which apply to property in which the foreign state at issue has an "interest of any nature whatsoever," *see, e.g.*, 31 C.F.R. § 515.201 (CACR); *id.* § 538.307 (Sudan sanctions); *id.* § 560.323 (Iran sanctions), and in the specific context of Cuba, also extend to property in which Cuban nationals have such an interest, *see* 31 C.F.R. § 515.201(a). If Congress had intended for all assets subject to OFAC blocking regulations to be within the scope of TRIA or FSIA, it would most likely have adopted this broader language from the blocking regulations. *See Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 439-40 (D.D.C. 2012). This narrower reading of the statutory language is also consistent with FSIA's legislative history—the Conference Committee Report explained that section 1610(g)(1) authorizes the attachment of "any property in which the foreign state has a beneficial *ownership*." H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Report) (emphasis added); *see also id.* (explaining that the provision "is written to subject any property interest in which the foreign state enjoys beneficial *ownership* to attachment and execution" (emphasis added)).

Furthermore, there is no indication that Congress intended to expand TRIA and FSIA beyond well-established common law execution principles, according to which "'a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor.'" *Heiser*, 735 F.3d at 938 (quoting 50 C.J.S. Judgments § 787 (2013)). Thus, TRIA's and FSIA's attachment provisions are best understood as applying only to those blocked

assets actually owned by the terrorist party, not all blocked assets in which the terrorist party has any interest of any nature.[7]

Not only is this interpretation of TRIA and FSIA consistent with the plain language of those statutes, their legislative history, and traditional common law principles, but it is also supported by important U.S. policy interests. First, the United States has a strong interest in preserving the President's ability to use blocked assets as a tool of foreign policy. Allowing some plaintiffs to attach blocked assets that are not owned by the sanctions target (in this case, Cuba) would selectively drain the pool of blocked assets, thereby reducing the leverage that

[7] In their First Petition, plaintiffs contend that *any* interest by Cuba in the assets is sufficient to render the accounts attachable. For this proposition, they rely on an earlier district court opinion in *Heiser*, which stated that "judgment creditors of state sponsors of terrorism may execute against 'any property in which [the terrorist state] has any interest.'" First Petition at 7 (quoting *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 18 (D.D.C. 2011)). But that language is not good law—rather, it is discredited dictum. The same district court later concluded that both TRIA and FSIA require an actual ownership interest. *See Heiser*, 885 F. Supp. 2d at 437-44. Furthermore, if the district court's earlier ruling ever had any force, it was overturned by the D.C. Circuit. *See Heiser*, 735 F.3d 934. Similarly, the brief footnote in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010)—on which the original, now defunct *Heiser* opinion relied—is dicta and without persuasive value. Plaintiffs are simply wrong when they describe the Government's view as "rejected" and "repeatedly disregard[ed]" by courts. *See* Pls.' Reply to Respondent's Mem. in Opp'n to Entry of 28 U.S.C. § 1610(c) Order & First & Second Petitions for Turnover ("Pls.' Reply") at 4-5, ECF No. 35. The only U.S. Court of Appeals to decide this issue has unambiguously adopted the Government's position. *See Heiser*, 735 F.3d 934. Indeed, it is plaintiffs who rely on discredited law in support of their argument. While a handful of district courts have held that assets are attachable under FSIA and TRIA where the terrorist party has a mere interest in such assets (in contrast to actual ownership), *see Hausler v. JP Morgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 562-68 (S.D.N.Y. 2012), *appeal pending sub nom., Estate of Fuller v. Banco Santander, S.A.*, Nos. 12-1264, 12-1272, 12-1384, 12-1386, 12-1463, 12-1466, 12-1945 (2d Cir.); *Hausler v. JP Morgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 529-41 (S.D.N.Y. 2010); *Levin v. Bank of N.Y.*, No. 09-cv-5900, 2011 WL 812032, at *16-17 (S.D.N.Y. Mar. 4, 2011), those courts fundamentally misunderstood the relationship between OFAC sanctions regimes, TRIA and FSIA, and existing sources of property law; and were mistaken for the reasons explained above, and by the D.C. Circuit in *Heiser* and Judge Cote in *Calderon-Cardona*, *see* 867 F. Supp. 2d at 401-04 (explaining why the district court's reasoning in *Hausler* was flawed); *see also* Brief for the United States as Amicus Curiae, *Hausler v. J.P. Morgan Chase Bank*, No. 12-1264 (2d Cir. July 9, 2012) (attached as Exhibit B).

these assets provide. *See Heiser*, 885 F. Supp. 2d at 441 ("Plaintiffs' sweeping interpretation would effectively—through future attachments and executions—eliminate the President's ability to use blocked assets as bargaining chips in solving foreign policy disputes."); *id.* at 435; *Rubin*, 709 F.3d at 57 ("The fact that blocked assets play an important role in the conduct of United States foreign policy may provide a further reason for deference to the views of the executive branch in this case."); *Tole v. Miller*, 530 F. Supp. 999, 1005 (S.D.N.Y. 1981) (noting that blocked assets can be used "for negotiation with the Cuban government").

Second, an interpretation of TRIA and FSIA that permits attachment of blocked assets that the terrorist party does not own would effectively subsidize terrorist states by allowing plaintiffs to satisfy a judgment from assets owned by innocent third parties. *See Heiser*, 735 F.3d at 939-40 (concluding that Congress could not have intended that potentially innocent parties pay some part of a terrorist state's judgment debt). This approach would not further TRIA's and FSIA's aim of punishing terrorist entities or deterring future terrorism. *Cf.* 148 Cong. Rec. S11527 (daily ed. Nov. 19, 2002) (statement by Sen. Harkin that allowing victims of terrorism to satisfy judgments against the property of a terrorist party "impose[s] a heavy cost on those" who aid and abet terrorist, and that "making the state sponsors [of terrorism] actually lose" money helps deter future terrorist acts).

In fact, not only would paying judgments from assets that are not owned by the terrorist party fail to impose a similar cost on the terrorist party, it would even assist terrorist parties by allowing them to reduce the outstanding judgments against them at the expense of innocent private parties. This concern is particularly acute here, where at least some of the assets that plaintiffs seek to attach could belong to individuals who may have themselves been the victims of the excesses of the Cuban regime, meaning that one set of victims of the Cuban regime would

be paying Cuba's debt for Cuba's wrongs against other victims. *See, e.g.*, *Tole*, 530 F. Supp. at 1002 (quoting a Senate Foreign Relations Committee report, which observed that if the blocked assets in the United States of nationalized Cuban companies to which uncompensated American stockholders of such companies had a claim were used to pay the claims of American citizens against the Cuban Government, "[t]his would be tantamount to using the property of one U.S. [c]itizen to pay the claim of another U.S. citizen"). That a substantial portion ($1 billion) of the plaintiffs' underlying judgment consists of punitive damages—intended to punish the wrongdoer rather than compensate the victim—further exacerbates this policy concern.

In sum, if the assets sought by plaintiffs are not owned by Cuba then they are not available to satisfy plaintiffs' judgment under FSIA or TRIA, and any transfer of these assets would be incompatible with the policy interests described above. Furthermore, absent a TRIA exception, any such transfer would be a transfer of blocked assets without an OFAC license, and thus would be null and void. *See* 31 C.F.R. § 515.203(e).

B. Before applying Cuban law, the Court should conduct a choice-of-law analysis

Because TRIA and FSIA only allow the attachment of assets "of" the terrorist party, the accounts at issue are not subject to attachment and execution unless they are owned by Cuba (or an agency or instrumentality thereof). Plaintiffs bear the burden of making this showing. *See Rubin*, 709 F.3d at 51. In order to determine whether particular assets are actually owned by Cuba, the Court must first decide what substantive law governs the ownership of the various assets in question.

Because Congress has not provided a rule for determining ownership under TRIA or FSIA, federal courts generally apply state property law, and if necessary, state choice-of-law rules to determine whether assets located in the United States are subject to execution. *See, e.g.*,

Karaha Bodas Co. v. Pertamina, 313 F.3d 70 (2d Cir. 2002) (applying state choice-of-law rules to determine ownership of property for purposes of attachment under FSIA); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (noting that FSIA, to which TRIA is appended, "operates as a 'pass-through' to state law principles" to "ensure that foreign states are liable in the same manner and to the same extent as a private individual under like circumstances"); *Calderon-Cardona*, 867 F. Supp. 2d at 400 (S.D.N.Y. 2011) (applying state law to determine ownership). Alternatively, at least one court "fashion[ed]" a federal common law rule of decision, applying certain provisions of the Uniform Commercial Code (UCC) to determine that contested fund transfers did not constitute property "of" Iran within the meaning of TRIA or FSIA. *See Heiser*, 735 F.3d at 940 (noting that the UCC "is often used as the basis of federal common law rules").

The United States takes no position on whether federal courts should look to state choice-of-law rules or federal common law principles in order to apply TRIA's and FSIA's ownership requirement. Furthermore, given the Comptroller's expertise in New York state law, the United States defers to the Comptroller's explanation of state laws that may be relevant to the determination of ownership in this case. However, the Government notes that the Comptroller makes several arguments regarding state law that would appear to impact the Court's choice-of-law analysis. For example, the Comptroller argues that bank deposits are subject to the dominion of the state in which they are located and that, if the Court were to apply state law, New York's Abandoned Property Law would govern the disposition of all of the assets sought by plaintiffs, because those assets are all held by the Comptroller in his capacity as custodian of unclaimed funds. Specifically, as the Comptroller points out, state law gives the Comptroller "full and complete authority to determine" claims for any abandoned property. N.Y. Aband.

Prop. § 1406(b); *see also* Mem. in Opp'n to Petition for Turnover of "Cuban Escheated Accounts" ("NY Opp'n to Third Petition") at 13, ECF No. 39; Surreply in Further Support of Opp'n to Pls.' Mot. for Entry of 28 U.S.C. § 1610(c) Order & First & Second Petitions for Turnover ("NY Surreply") at 3-4, ECF No. 41.

With respect to the First Petition, the Comptroller explains that a New York state court has previously denied Cuba's claim to the Trans-Cuba accounts, and ordered their liquidation and distribution to former Trans-Cuba shareholders. *See* Mem. in Opp'n to Pls.'s Mot. for Entry of 28 U.S.C. § 1610(c) Order & First & Second Petitions for Turnover ("NY Opp'n to First & Second Petitions") at 11-13, 19-22, ECF No. 27; NY Surreply at 2-4; *Honey Mann v. Compania Petrolera Trans-Cuba*, No. 11172/1960 (N.Y. Sup. Ct.); *Tole*, 530 F. Supp. at 1000-01 (describing the *Honey Mann* litigation). In short, as a result of the *Honey Mann* litigation, all but one of the Trans-Cuba accounts are held by the Comptroller in the names of individuals who were determined by the *Honey Mann* court to be entitled to a portion of Trans-Cuba's assets in the United States at the time of the corporation's nationalization. The remaining account contains the balance of the liquidated Trans-Cuba assets that were not allocated to a specific shareholder during the *Honey Mann* proceedings, and is being held by the Comptroller for the benefit of those former Trans-Cuba shareholders who have not yet successfully asserted a claim (because of a failure to prove a claim of ownership or a failure to present such a claim).

Finally, the Comptroller identifies other state law that would also appear to be relevant to the determination of ownership of the individual accounts that are the subject to the Third Petition. Specifically, as the Comptroller explains in his Opposition to the Third Petition, "where a foreign decedent dies intestate with no heirs, his or her property located in New York escheats to the State of New York and cannot be expropriated by the government of the

decedent's domicile under its own escheatment laws." NY Opp'n to Third Petition at 18 (citing New York cases). Furthermore, it would appear that a court applying New York choice-of-law principles might refuse to enforce Cuban law on the grounds that it violates public policy. *See id.* at 19-21.[8]

Whichever body of law is applied, the determination of ownership should be consistent with the weight of authority that favors a strict construction of attachment statutes in order to avoid punishing innocent parties—a consideration that is particularly acute with respect to blocked assets. *See Heiser*, 735 F.3d at 939. In other words, TRIA and FSIA should not be interpreted as recognizing an attachable property interest that would not otherwise be recognized in cases involving execution against unregulated assets.

C. If necessary, the Court should carefully scrutinize how the Cuban laws operate as to the assets at issue

Even if the Court were to apply Cuban law to determine ownership of the assets, several questions remain about how those laws might operate that, at a minimum, should be clarified before the Court decides that the assets belong to Cuba. First, with respect to the entity accounts at issue in the Second Turnover Petition, except for Banco Nacional, the plaintiffs have provided no evidence to support their contention that these are actually Cuban companies that would have been affected by laws prohibiting private businesses. As the Comptroller points out, many of the corporations at issue appear to be non-Cuban entities, such as Banco Hipotecario, which is an Argentinian bank. *See* NY Opp'n to First & Second Petitions at 13-14. Nor have plaintiffs cited

[8] In their reply to the Comptroller's opposition to the First and Second petitions, plaintiffs argue that state law is preempted by TRIA. *See* Pls.' Reply at 23-28. The United States takes no position here on the preemptive force of TRIA generally. The Government notes that plaintiffs' argument is based on an overbroad understanding of ownership under TRIA. *See supra* note 7. As explained above, TRIA does not provide a rule for defining ownership, and thus does not come into conflict with state law on this question in this case.

to any specific Cuban laws purportedly relevant here, which makes it impossible to assess their content and whether they are, in fact, applicable to the assets at issue.[9] Furthermore, even if some of the relevant entities were nationalized at some point and the nationalization laws did purport to affect assets of those companies held outside of Cuba, the record does not indicate when such nationalizations occurred. To the extent any nationalization is alleged to have occurred after July 8, 1963—the effective date of the CACR—any such purported transfer of ownership would be void in the United States without authorization from OFAC. *See* 31 C.F.R. §§ 515.201(b), 203(a); *see also* Order, *Martinez v. Republic of Cuba*, No. 10-22095, at *2 (S.D. Fla. Aug. 29, 2011) (order dissolving writs of garnishment) (attached as Exhibit C). Notably, plaintiffs themselves admit that at least some Cuban businesses were nationalized *after* 1963. *See* Second Petition at 5 ("*By 1968*, all privately owned corporate entities in Cuba had been nationalized by the Cuban government and all of the assets of those corporations became Cuban government assets." (emphasis added)).

With respect to the Third Petition, it is unclear from a plain textual reading of the Cuban laws relied on by plaintiffs that they would apply to the accounts at issue. Article 195.1 of the Cuban Civil Code provides that "[m]oney, jewelry, or other valuables hidden in the earth, the sea, or in other places and whose legitimate ownership is not apparent, shall be the property of the State." U.S. Department of State, Office of Language Services, Translation: Selected Articles of Law No. 59, the Civil Code of the Republic of Cuba (2014) (attached as Exhibit D). Although plaintiffs assert that the accounts have been abandoned and Article 195.1 applies, they have made no showing that the accounts lack "legitimate ownership" information. In fact, as

[9] Although the Affidavit of Jorge Salazar-Carrillo makes general mention of laws enacted in 1960 and 1968, *see* ECF No. 17-2 ¶¶ 7-8, neither plaintiffs nor Mr. Salazar-Carrillo specifically identifies these laws, let alone makes them available to the Court.

explained in the Comptroller's Opposition to the Third Petition, at least one account holder has been identified for all 260 individual accounts. *See* NY Opp'n to Third Petition at 16.

Similarly, it is unclear how Article 546 of the Cuban Civil Code would apply to the assets at issue in this case. Article 546 sets forth certain conditions under which property transfers to Cuba upon the owner's death. But, as the Comptroller points out, with respect to the particular accounts at issue here, there is no evidence that these conditions have been satisfied, or even that the named account holders have passed away, let alone passed away without heirs. *See id.* at 17-18. The Comptroller also raises the prospect that these abandonment and inheritance laws may not have even been in effect at the relevant time because the Cuban Civil Code was not enacted until 1987. *See id.* at 13-14. The United States is not currently in a position to opine on whether these laws may have existed as freestanding provisions prior to 1987, but if the Court finds it necessary to reach this issue, it should at least ask for evidence on this question. Again, any purported transfer of property that occurred subsequent to the July 8, 1963 effective date of the CACR would be void without authorization from OFAC. *See* 31 C.F.R. §§ 515.201(b), 203(a).

II. The Act of State Doctrine Does Not Effect a Transfer of the Accounts at Issue to Cuba

Plaintiffs, in their most recent brief, argue that the Act of State doctrine should apply in this case with respect to the First and Second Petitions because they claim that Cuba owns the assets following its nationalization of the businesses that owned the assets. They are, in essence, asking this court to recognize downstream effects on property in the United States of the nationalization of entities in Cuba. *See* Pls.' Reply at 16-22. As an initial matter, this argument would be relevant to the first petition only if the Court were to determine that the *Honey Mann* proceedings were not *res judicata* or otherwise dispositive. And it would be relevant to the

second petition only if an official decree or other act nationalizing the entities that hold the accounts is identified.[10]

However, even assuming such hurdles could be overcome, courts have recognized a "corollary to the act of state doctrine, the so-called 'extraterritorial exception,' which holds that, when the consequences of applying the doctrine would be inconsistent with the policy and law of the United States, 'our courts will *not* give 'extraterritorial effect' to a confiscatory decree of a foreign state, even where directed against its own nationals.'" *Tchacosh Co., Ltd. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1336 (9th Cir. 1985) (emphasis added) (quoting *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972)); *see also Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.*, 658 F.2d 903 (2d Cir. 1981). Thus, courts, in the face of foreign confiscatory laws purporting to affect property in the United States, have generally declined on policy grounds to give effect to the act of state.[11]

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[10] To the extent that plaintiffs may be arguing that Cuban law operates directly on the accounts in the United States, the Act of State doctrine would not apply. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power *committed within its own territory*." (emphasis added)).

[11] *See, e.g.*, *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51-52 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) (declining to enforce Iraqi ordinance purporting to confiscate account in New York of deceased Iraqi King on grounds that it was a foreign ordinance affecting property in the United States that conflicted with U.S. law and policy); *Williams & Humbert Ltd. v. W.&H. Trade Marks Ltd.*, 840 F.2d 72, 75-77 (D.C. Cir. 1988) (considering it "clear that, had Spain attempted to expropriate without compensation property that was owned directly by the [applicant] and that was within the United States at the time of expropriation, our courts would not assist Spain in obtaining such property within the United States" and finding that same principle also applied with respect to expropriated company holding U.S. trademark in which applicant owned shares); *Maltina Corp.*, 462 F.2d at 2027 (considering the expropriation of the assets of a Cuban corporation by the Cuban government to be a foreign decree purporting to expropriate property within the United States insofar as the related United States trademark was concerned, which the court therefore tested for compatibility with United States laws and policies and found it to violate the principle prohibiting deprivation without compensation); *Menendez v. Saks*, 485 F.2d 1355, 1364 (2d Cir. 1973) (finding Cuba's attempted expropriation

Plaintiffs' contention that reliance on Cuban law for the turnover of the assets in the United States is appropriate because such transfer is consistent with U.S. policy is meritless. *See* Pls.' Reply at 19-20.[12] It is the Executive's determination of policy interests, not plaintiffs' views, that should control. *See Rubin*, 709 F.3d at 57; *Heiser*, 885 F. Supp. 2d at 441. Moreover, the CACR reflects a U.S. policy judgment that certain uncompensated shareholders of corporations whose blocked assets have been purportedly nationalized by Cuba, should be able to unblock and access their net pro rata share of the U.S.-located assets of said corporations. *See* 31 C.F.R. § 515.521 (a) (providing that "[s]pecific licenses may be issued unblocking the net pro rata shares of individuals who are permanent residents of the United States . . . in U.S.-located assets of corporations formed under the laws of Cuba," where certain enumerated conditions are met, including that "[i]n cases where the blocked assets purportedly have been nationalized by Cuba, compensation has not been paid to the applicant(s)").

Finally, the absence of objections by the account holders cannot substitute for a sound legal basis establishing Cuban government ownership of the property. Pl's Reply at 20. The failure of the record account holders to object, or otherwise to assert an interest in these assets during the period that they have been blocked, should not be viewed as consent. During this period, any transfer of the assets could not have taken place without authorization from OFAC,

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of accounts receivable located in the United States ineffective because seizure without compensation is contrary to domestic policy), *rev'd sub nom. on other grounds, Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

[12] *Banco Nacional*, 658 F.2d 903, and *United States v. Belmont*, 301 U.S. 324 (1937), on which plaintiffs rely, *see* Pls.' Reply at 20-22, are inapposite. In those cases, there is no indication that the United States took the position that the recognition of the extraterritorial effects of the nationalization would be contrary to U.S. policy. Indeed, in *Belmont*, on which *Banco Nacional* relies, *see* 658 F.2d at 908-09, the recognition of the foreign expropriation clearly *advanced* U.S. policy, as reflected in an agreement between the United States and Russia.

which, depending on a variety of factors and the statements of licensing policy incorporated into the CACR at that time, may or may not have been available to to each specific account holder.

CONCLUSION

The United States has a substantial policy interest in assuring that TRIA and FSIA are correctly construed and applied, particularly to ensure that assets that are not owned by a foreign state or terrorist party are not attachable to satisfy a judgment against the foreign state or terrorist party. In accordance with the principles set forth herein, the Government respectfully urges the Court to properly determine whether the assets at issue in this case are actually owned by Cuba, or an agency or instrumentality of Cuba.

Respectfully submitted this 15th day of October, 2014,

JOYCE R. BRANDA
Acting Assistant Attorney General

RICHARD S. HARTUNIAN
United States Attorney

JOSEPH H. HUNT
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK
Bar Roll No. 518959; MA Bar No. 679207
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7306
Washington, D.C. 20001
Tel: (202) 305-8573; Fax: (202) 616-8470
Email: benjamin.l.berwick@usdoj.gov

Attorneys for the United States

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK